



July 11, 2011

Via E-mail: consultation@doi.gov

Consultation Policy Documents
U.S. Department of the Interior
Room 5219 MIB
Washington, DC 20241

Re: Comments on Proposed Policy on Consultation with Indian Tribes, 76 Fed. Reg. 28446
(May 17, 2011)

Dear Sir or Madam:

On behalf of Barrick Gold of North America, Inc. and its affiliates ("Barrick"), thank you for the opportunity to comment on the proposed U.S. Department of the Interior Policy on Consultation with Indian Tribes ("Policy").

Barrick, collectively, operates mines on U.S. Bureau of Land Management ("BLM") lands in Nevada and Montana, and also is pursuing exploration activities on BLM lands throughout the western United States and Alaska. As a result of those activities, Barrick has gained extensive experience, and has an important stake, in working with Native American and Native Alaskan tribes and other groups.

Comprehensive and effective stakeholder engagement, specifically including Indian Tribes, together with rigorous health, safety and environmental compliance programs, are cornerstones of Barrick's corporate responsibility programs and its commitment to responsible mining. As part of these policies, Barrick has sought to engage with all its stakeholders, including local communities, Native American tribes and related groups, BLM and others.

With that background and perspective in mind, Barrick provides the following comments to the proposed Policy:

General Comments

1. Generally, Barrick recognizes and supports government-to-government consultation between federal agencies and federally recognized Indian tribes. Barrick believes that the focus of the policy on federal recognized tribes is appropriate. Native groups that are not federally recognized and even collections of tribes with organizational structures not recognized by the federal government should not be

included as part of the Policy. Such groups are not sovereign entities, often lack accountability, and their missions and goals are not necessarily consistent with those of federally recognized tribes with governing responsibilities.

2. Barrick's comments focus principally on consultation associated with "Departmental Actions with Tribal Implications." In addition, however, Barrick also comments as a public lands stakeholder, which seeks to ensure fair and reasonable rulemaking, policy and legislative development consistent with applicable law.

Implementation of Existing Consultation Obligations or Establishment of New Obligations

1. The Policy delivers an inconsistent message concerning whether it seeks solely to implement existing consultation obligations or to establish new rules and obligations for additional consultation. In one segment, as discussed below, the Policy suggests not just a process for conversations with tribes, but arguably the potential for tribes to exercise veto power over decision-making or at least a share of the decision making role.
2. On the one hand, the third sentence of the Preamble suggests that the Policy is designed to provide a framework for the Department of the Interior ("Department") to fulfill its Tribal consultation requirements, whether directed by statute, Executive Order, "or other applicable Secretarial Orders or policies." From this statement, Barrick understands that the Policy is an implementation mechanism, and is not intended to establish new consultation obligations. This seems the appropriate role for the proposed Policy. Should this understanding be incorrect, Barrick requests that the Policy be withdrawn and reissued – in improved form – for processing as a rulemaking under recognized federal procedures, including notice and comment processes under the Administrative Procedures Act.
3. On the other hand, the Policy appears to propose heightened consulting obligations beyond what is required under existing laws and orders. Indeed, the Policy proposed obligations that extend well beyond the appropriate role of "consultation." Under the guise of consultation, the Policy provides: "consultation is a deliberative process that aims to create effective collaboration . . . **where all parties share a goal of reaching a decision together.**" 76 F.R. at 28446. Perhaps this rhetoric is introductory only and is not intended to suggest that the Department would share decision making responsibilities with federal recognized tribes. The Department cannot share or delegate such responsibilities, of course, absent statutory authorization. Congress has been very clear when it has authorized the Executive Branch to delegate responsibilities to Indian tribes. Moreover, federal agencies have used appropriate rulemaking procedures when effectuating such congressionally authorized action. See, e.g., Clean Water Act, Section 518(e) and 40 C.F.R. § 131.8 (2010); and Clean Air Act, Section 301(d) and 40 C.F.R. Part 49 (2010).

In the present situation, Congress has not authorized delegations – in whole or in part – concerning land management decisions by Department agencies such as the BLM to Indian tribes.

4. Under Section VII.E.2, the Policy provides that a Bureau “should make all reasonable efforts to comply with the expressed views of the affected Tribes regarding the process timeline [at the Proposal Development Stage of a Departmental Action with Tribal Implications]” *Id.* at 28449. While the Policy does not use the word “shall” in this sentence, the proposed directive to agency officials puts Indian Tribes in an unusually strong position to dictate the timeline for processing an application, such as a proposed Plan of Operations. This makes no sense either. As the Department should know, ever since the passage of the National Environmental Policy Act in 1969 (“NEPA”), project opponents in some cases have abused the NEPA process by seeking to delay agency approval until the project proponent gives up, or the project becomes uneconomic, or both. With the proposed Policy, Indian Tribes are placed in a position to effectively dictate project timelines. This is the legal equivalent of the fox guarding the hen house. This sort of government sanctioned delay mechanism is wholly inappropriate. Moreover, it is inconsistent with the Department’s own NEPA implementing regulations, including 43 C.F.R. §46.240, which requires the Department’s Bureaus to set time limits for NEPA analysis and documentation.
5. The language that follows in Section VII. E.2 – suggesting that consultation may be foreshortened where federal law or regulation may prohibit continued discussion or delay -- sounds nice, but as a practical matter, Barrick challenges the Department to identify when such circumstances would occur.
6. Section VII.E.3 provides yet further open ended opportunities to slow Department decision making. The proposed post-consultation review process would provide yet further opportunities to delay federal decisions.

Staffing, Resources, and Timely Permit Processing and Decision-Making

1. The Policy raises serious questions concerning whether the Department will have the necessary resources to implement this Policy effectively and in a fashion that will not further delay the processing of permit applications necessary for operators to function efficiently.
2. Tribal Liaison Officers and the Tribal Governance Officer (“TGO”), as defined in the Policy, will have substantial obligations. The Department must designate and fund sufficient numbers of such officers to ensure that federal processing of permit applications and other activities triggering tribal consultation requirements are not

delayed due to a shortage of Tribal Liaison Officers or the lack of direct accessibility of the Tribal Governance Officer.

3. Operators on federal public lands already face daunting challenges in remaining competitive with competitors operating on private lands or in other countries. Imposing additional requirements that complicate the competitive position of those seeking to develop mineral resources on federal lands is counterproductive.
4. In finalizing this Policy, the Department should balance the implementation of the United States' trust responsibilities to Indian Tribes with other policies designed to promote the availability of resources produced from federal public lands as part of our national economy.
5. On a related point, the Policy should provide more thoughtful guidance to Bureaus and Offices concerning accountability and reporting. We agree that the focus of accountability and reporting should be on effectiveness, not on the volume of consultation meetings, phone contacts, and the like. Quality, not quantity should be the measure.
6. On the subject of training, we agree that training is essential. Far too many people, including agency officials, Indian tribes, and others misunderstand the scope and definition of the federal government's trust responsibilities. The U.S. Supreme Court has issued a number of thoughtful decisions defining the scope of the United States' trust responsibility in the last thirty years or so. As those decisions indicate, the trust responsibility has its moorings in federal statutes, and is not a free-standing doctrine. *See generally United States v. Navajo Nation*, 537 U.S. 488 (2003). Those decisions should be an important element of the training.

Consultation with Sovereigns or Paternalism

1. Section VII.A of the Policy states in part: “. . . , the fact that an Indian Tribe may choose not to engage the TGO does not relieve a Bureau or Office of its obligation to engage in consultation as described by this Policy.” *See* 76 FR at 28447-48. The Policy continues, and imposes the obligation for agency officials to try again and again to engage Indian Tribes in consultation. *Id.* at 28448.
2. Barrick submits that such repetitive efforts, particularly where an Indian Tribe has chosen affirmatively not to engage in government to government consultation, makes no sense. As sovereigns, Indian tribes are certainly able to speak for themselves and make decisions concerning whether or not to consult.
3. Indian tribes with wide ranging aboriginal lands likely are already inundated with a multitude of requests to consult. To require federal agency officials to ask again and

again simply adds to the bureaucratic paperwork that tribal officials may need to address and increases the likelihood that tribes simply will not respond to requests for consultation.

4. The Department should allow Indian Tribes to make their own decisions concerning consultation participation, and not pester them repeatedly with follow-up requests.
5. Similarly, Indian Tribes should take responsibility to provide clear and unambiguous responses to agency officials when asked whether they choose to participate in government-to-government consultation (or in other consultation processes as defined under federal statutes and regulations).

Dispute Resolution or Consultation

1. Section VII.D refers to the use of “neutral facilitation and other collaborative problem-solving approaches to promote effective dialogue and conflict resolution.” *Id.* at 28448. These notions suggest that the Policy is intended to address – at least in part -- dispute resolution rather than consultation. This concept would appear also to abrogate the statutory decision-making responsibility of the agencies. Barrick recommends that dispute resolution mechanisms do not have a place in a government-to-government consultation policy, but if it does, any policy should be developed in better detail to put tribes and the public on notice of what is intended.

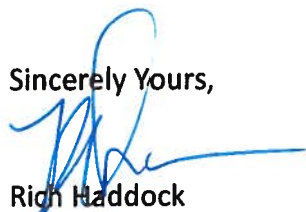
Source of the Consultation Obligation

1. Consultation should not always exclude other stakeholders. In this regard, Barrick recognizes that true government-to-government consultation should be just between sovereigns. However, the Department should be certain to differentiate carefully between such government to government consultation on the one hand, and the various other consultation obligations that arise from various statutes and regulations. For example, Section 106 of the National Historic Preservation Act provides for consultation, but not just with interested Indian Tribes and groups. Rather, the consultation process there necessarily includes – for public lands, State Historic Preservation Officers, project proponents, and others.

As noted at the outset, Barrick appreciates the opportunity to comment on the proposed Policy. Please let me know if you have any questions or concerns.

Thank you for your consideration of Barrick's comments. You may reach me at (801) 990-3830.

Sincerely Yours,

A handwritten signature in blue ink, appearing to read 'Rich Haddock', with a long horizontal flourish extending to the right.

Rich Haddock
Vice President and General Counsel, North America